

Supreme Court, U. S.

FILED

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MICHAEL RODAK, JR., CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-314

**CHESTER PAUL SWONGER**

**ZELLA FAYE FARMER and**

**JESS WARREN PIERCE** - - - Petitioners

*versus*

**UNITED STATES OF AMERICA** - - Respondent

On Petition for the Writ of Certiorari to the  
United States Court of Appeals  
for the Sixth Circuit

## PETITIONERS' REPLY BRIEF

**CECIL D. BRANSTETTER**

200 Church Street

Nashville, Tennessee 37201

*Attorney for Petitioners*

*Of Counsel:*

**BRANSTETTER, MOODY and KILGORE**

200 Church Street

Nashville, Tennessee 37201

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**PETITIONERS' REPLY BRIEF**

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In its counter-statement of jurisdiction, the respondent asserts that the petition for writ of certiorari is out of time under Rule 22(2) of the Rules of this Court.

1. Timeliness is not jurisdictional and does not bar this Court's exercise of discretion to consider the petition. *Durham v. United States*, 401 U. S. 481 (1971), overruled on another point, *Dove v. United States*, 423

U. S. 325 (1976); *Taglianetti v. United States*, 394 U. S. 316, n. 1 (1969).

2. The petitioners submit that the petition should be deemed to be in time because of the manner in which the Court of Appeals disposed of the petition to rehear in that Court. Although that Court did state that the motion to file an extended petition to rehear or for alternative relief was "denied in its entirety for the reason that the petition for rehearing was not timely filed or timely tendered for filing" [Pet., p. 48], it went on to consider the merits of the petition to the extent of distinguishing the case of *United States v. Chadwick*, — U. S. —, 53 L. Ed. 2d 538 (No. 75-1721, decided June 21, 1977), on which a large part of the petition to rehear had been based. Petitioners respectfully submit that this consideration of the merits amounted, in effect, to an exercise of the Court's power under Rule 26(b), Federal Rules of Appellate Procedure, to permit an act to be done after the expiration of the allotted time.

3. The petitioners respectfully submit that the Court of Appeals abused its discretion in denying their motion either for leave to file the extended brief under Rule 40(b), F.R.A.P., or for the alternative relief of an extension of time under Rule 26(b), F.R.A.P., within which to file a brief condensed to the standard length prescribed by that Rule. The Clerk had refused to file the petition to rehear because of counsel's failure to remember or discover anew the page limitation, and counsel remained unaware of his error in calculating the time allowed for filing a petition to rehear until receipt of the Court's order of July 28, 1977. In his

motion for leave to file or for an extension within which to condense the petition to proper size, he presented what he considered good cause and a case of excusable neglect in overlooking the page limitation, including the need to include reference to the *Chadwick* case, *supra*, which came to hand on July 1, 1977, which (in retrospect) appears to have been the date the petition should have been mailed for delivery on the first day after the Independence Day weekend. If he had been aware of error in calculation of the time, he could have pointed out further in support of extension of time these facts: (1) the order of affirmance had been entered only seven days after oral argument and arrived, to the best of counsel's recollection six days later than that on Monday, June 27; and (2) that he had, in fact, less than five days, for preparation of the petition for mailing on the Friday before the next court day when it was due.

4. The petitioners submit that, if they be wrong in the foregoing, nevertheless this case presents serious and important questions that merit full consideration by this Court, and that the unusual circumstances of timing and disposition in the Court of Appeals and the delays in the respondent's brief constitute good cause for waiving the time between June 21 and July 28, 1977. The petition for certiorari was filed within 30 days after the latter date.

CECIL D. BRANSTETTER  
BRANSTETTER, MOODY & KILGORE  
200 Church Street, 4th Floor  
Nashville, Tennessee 37201

*Attorney for Petitioners*